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13     Infinite Energy Home Services, Inc.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

INFINITY ENERGY, INC., a  
California Corporation,  
Plaintiff.

v.

INFINITE ENERGY HOME  
SERVICES, INC., a California  
Corporation.

Defendant.

Case No.  
2:21-cv-00438-WBS-KJN  
Hon. William B. Shubb

DEFENDANT'S STATEMENT OF UNDISPUTED  
FACTS  
IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT,  
OR IN THE ALTERNATIVE,  
MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: May 30, 2023  
Time: 1:30 p.m.  
Location: Courtroom 5

Defendant INFINITE ENERGY HOME SERVICES, Inc. respectfully submits this Statement of Undisputed Facts in support of Defendant's Motion for Summary Judgment, or in the Alternative, Motion for Partial Summary Judgment, as required by Rule 56 of the Federal Rules of Civil Procedure and L.R. 260(a).

All "Def. Ex." References herein are to the Arel Declaration that attaches all relevant evidence. The Exhibits are also identified by shorthand for ease of reference: Kelly is the Person

1 most Qualified for Plaintiff; Expert Farrell is Plaintiff's Expert  
 2 Patrick Farrell, and Expert Harper is Defendant's Rebuttal Expert  
 3 Rhonda Harper.

4  
**FACTS NOT IN DISPUTE**  
 5

<b>Fact</b>	<b>Evidence</b>
7       1. Plaintiff's mark Infinity 8 Energy is registered under 9 International Class 037 for the 10 installation of Solar energy 11 systems and alternative energy 12 products for residential and 13 commercial use. 14	Plaintiff's First Amended 15 Complaint ("Am. Compl."), Ex. 1, ¶ 1-3, ECF No. 7; Def.s Ex. A, ¶ 1-3. 16
17       2. Plaintiff's mark Infinity 18 Energy is registered as a 19 standard word character mark, 20 and does not claim a particular 21 style, size, font, or color as a 22 feature of the mark. 23	Pl.'s Am. Compl., Ex. 1, ¶ 5, 24 ECF No. 7; Def. Ex. A 25
26       3. On May 26, 2020, USPTO sent 27 an Office Action to Plaintiff 28 that a disclaimer was required for registration. 29	Def. Ex. P 30



1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	4. The word Energy is disclaimed from Plaintiff's mark Infinity Energy.	Am. Compl., Ex. 1, ¶ 5, Def. Ex. A
5 6 7 8 9 10	5. Plaintiff registered its mark Infinity Energy with the United States Patent and Trademark Office on September 29, 2020.	Am. Compl., Ex. 1, Def. Ex. A
6 7 8 9 10 11 12 13 14 15	6. The dictionary definition of "Infinity" is unlimited extent of time, space, or quantity.	Def. Ex. B, Dictionary Definition "Infinity" Merriam-Webster.com Dictionary, Merriam-Webster, (Apr. 10, 2023) <a href="https://www.merriam-webster.com/dictionary/infinity/">https://www.merriam-webster.com/dictionary/infinity/</a> .
7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	7. Plaintiff's Chief Sales Officers, Kelly Cameron, who came up with the name Infinity Energy, believes that the name is not unique.	Def. Ex. D, Deposition of Kelly Cameron ("Kelly Dep.") 31:5-7
8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	8. Infinity and Infinite are two separate words; and one is a noun, the other is an adjective.	Def. Ex. B, Dictionary Definition "Infinity" Merriam-Webster.com Dictionary, Merriam-Webster, (Apr. 10, 2023) <a href="https://www.merriam-webster.com/dictionary/infinite">https://www.merriam-webster.com/dictionary/infinite</a>

	<p>1 y/.</p> <p>2</p> <p>3 Def. Ex. C, Dictionary</p> <p>4 Definition "Infinite"</p> <p>5 Merriam-Webster.com</p> <p>6 Dictionary, Merriam-Webster,</p> <p>7 (Apr. 10, 2023)</p> <p>8 https://www.merriam-</p> <p>9 webster.com/dictionary/infini-</p> <p>10 te/.</p> <p>11</p> <p>12 Def. Ex. D, Kelly Dep. 25:17-</p> <p>13 22</p> <p>14</p> <p>15 Def. Ex. L, Expert Farrell, ¶¶</p> <p>16 12, 13</p>
<p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p>	<p>9. Plaintiff's mark Infinity Energy is associated with getting an infinite supply of energy from the Sun, which is where Solar energy comes from.</p> <p>Def. Ex. D, Kelly Dep. 31:23-32:3</p> <p>Exhibit T</p>
<p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p>10. Plaintiff is not the only company who uses Infinity Energy or includes Infinity Energy in their name to provide services in the Solar energy industry.</p> <p>Def. Ex. E</p> <p>Def. Ex. F</p> <p>Def. Ex. D, Kelly Dep. 36:4 - 37-4;</p> <p>Def. Ex. L, Expert Farrell ¶ 17</p>

1 2 3 4 5 6 11. There are 66 live USPTO trademarks with the word INFINITY in exact or alternative spelling registered under International Class 037.	Def. Ex. E
7 8 9 10 11 12 12. There are 20 live USPTO trademarks with the word INFINITY in exact or alternative spelling for Solar goods or services.	Def. Ex. F
13 14 15 16 13. There are 841 live USPTO trademarks with the word ENERGY within the Solar industry.	Def. Ex. G
17 18 19 20 21 22 14. Defendant uses the name Infinite Energy or Infinite Energy Home Services to market Defendant's Solar energy services.	Def. Ex. H, p. 3, ll. 27-28 - p. 4, ll. 1
23 24 25 26 27 28 15. Dictionary definition of "Infinite" is extending indefinitely.	Def. Ex. C, Dictionary Definition " <i>Infinite</i> " <i>Merriam-Webster.com</i> Dictionary, Merriam-Webster, (Apr. 10, 2023) <a href="https://www.merriam-webster.com/infinite/">https://www.merriam-webster.com/infinite/</a>

1 2 3 4 5 6 7 16. Plaintiff does not provide any services related to whole house surge protector, replacement or upgrade of windows and doors, HVAC, and outdoor deck installation.	Def. Ex. I, p. 4, ll. 10-11
8 9 10 11 12 17. Plaintiff does business in the states of California, Texas, Nevada, Idaho, Florida, Colorado and New Jersey.	Def. Ex. J, p. 10, l. 7;  Def. Ex. D, Kelly Dep. 22:19- 23:6
13 14 15 16 17 18. Defendant does business in El Dorado County, Placer County, and Sacramento County, the State of California.	Def. Ex. K, p. 3 ll. 26-28, p. 4, ll. 1-8
19 20 21 22 23 24 19. Plaintiff's Chief Sales Officer, Cameron Kelly has no direct knowledge of inquiries Plaintiff received from third parties attempting to reach Defendant instead of Plaintiff.	Def. Ex. I, p. 5, ll. 7-19
25 26 27 28 20. Consumer surveys are important in Lanham Act cases	Def. Ex. M, Expert Harper, ¶ 29

1	involving consumer confusion.	
2	21. Plaintiff did not conduct	Def. Ex. M, Expert Harper, ¶¶
3	any consumer confusion surveys	27, 28, 33, 36
4	regarding Plaintiff's Infinity	Def. Ex. D, Kelly Dep. 33:10-
5	Energy mark in connection with	18
6	this trademark infringement	
7	lawsuit.	
8		
9		
10	22. According to Plaintiff's	Def. Ex. D, Kelly Dep. 56:7-16
11	Person Most Qualified, Cameron	
12	Kelly, Plaintiff failed to track	
13	any communications displaying	
14	customer confusion.	
15		
16	23. Plaintiff's expert Farrell	Def. Ex. L; Expert Farrell, ¶
17	relies on Farrell's personal	¶ 18 - 24
18	computer search in an attempt to	Def. Ex. M, Expert Harper, ¶¶
19	show actual consumer confusion	42, 44
20	in Farrell's expert report about	
21	consumer confusion between	
22	Plaintiff and Defendant.	
23		
24	24. Plaintiff's expert Farrell	Def. Ex. L, Expert Farrell ¶
25	believes the words Infinite and	12-14
26	Infinity are similar.	
27		
28		

<p>1        25. Plaintiff's expert opinion  2        relies on a cropped section of  3        the FinanceGuru Post that  4        isolates the term "Infinity"  5        from the overall post which uses  6        the term "Infinite" 12 times  7        about a Florida based company  8        Infinite Energy as evidence of  9        customer's being confused.</p>	<p>Def. Ex. L; Expert Farrell,  § 24;    Def. Ex. M, Expert Harper,  § 45</p>
<p>11      26. Plaintiff's expert opinion  12      relies on a 2015 webpage with  13      testimonials for an Australian  14      company named Infinite Energy on  15      which two users use Infinity  16      instead of Infinite to refer to  17      the Australian company  18      references customer's being  19      confused.</p>	<p>Def. Ex. L; Expert Farrell,  § 22;    Def. Ex. M, Expert Harper,  § 46</p>
<p>22      27. Plaintiff's expert  23      Farrell's expert report does not  24      define or analyze the relevant  25      marketplace and consumers.</p>	<p>Def. Ex. M, Expert Harper, § 38, 41</p>
<p>27      28. Plaintiff's expert</p>	<p>Def. Ex. M, Expert Harper, § 41</p>

1	Farrell's expert report does not	33 - 36
2	contain a likelihood of	
3	confusion survey or polling	
4	among consumers.	
5		
6	29. Search result listings are	Def. Ex. M, Expert Harper, ¶¶
7	not evidence of people actually	40-44
8	being confused.	
9		
10	30. Plaintiff uses the	Def. Ex. N
11	following website to market its	
12	Solar energy services:	
13	" <a href="https://infinityenergy.com/">https://infinityenergy.com/</a> "	
14		
15	31. Defendant uses the	Def. Ex. O
16	following website to market its	
17	services,	
18	" <a href="https://www.infiniteenergyco.com/">https://www.infiniteenergyco.com/</a> "	
19		
20		
21	32. Defendant used the name	Def. Ex. H, p. 5, ll. 13-17
22	Infinity Energy at some point	
23	from 2014 to present.	
24		
25	33. Defendant received revenue	Def. Ex. H, p. 5, ll. 8-12
26	from customers while utilizing	
27	the name Infinity Energy.	
28		

<p>1       34. Plaintiff's designated 2       Plaintiff's Chief Sales Officer 3       Cameron Kelly as the person most 4       qualified to speak as to the 5       facts and circumstances 6       concerning the allegations 7       Plaintiff ("PMQ") made in 8       Plaintiff's First Amended 9       Complaint.</p>	<p>Def. Ex. D, Kelly Depo. 3:10- 12; 18:8 - 19:9</p>
<p>11      35. Plaintiff's PMQ is the most 12      qualified person to speak as to 13      insides sales, including 14      internal marketing sales 15      channel, which are the mostly 16      impacted sales channels and have 17      the most issues.</p>	<p>Def. Ex. D, Kelly Depo. 18:13 - 19:9</p>
<p>19      36. Plaintiff's Chief Sales 20      Officer Cameron Kelly has been 21      Plaintiff's Chief Sales Officer 22      since Plaintiff's inception in 23      2014.</p>	<p>Def. Exh. 5, Kelly Depo. 13:14-19</p>
<p>25      37. Plaintiff provides 26      consumers with information about</p>	<p>Def. Ex. Q</p>

1	Plaintiff's services.	
2	38. Plaintiff's consumers can 3 enter into a power purchase 4 agreement, solar lease 5 agreement, or a loan agreement 6 with Plaintiff.	Def. Ex. Q  Def. Ex. R
7	39. Plaintiff's Banner says 9 "There's never a shortage of 10 solar energy."	Def. Ex. T
11	40. Defendant's Chief Executive 12 Officer is Richard Walton	Def. Ex. S
13	41. Plaintiff amended the servicemark to disclaim the word 14 Energy.	Def. Ex. U
15	42. The marketplace appearance 16 of Plaintiff's service mark is: 17	Def. Ex. N
18	 The logo consists of a stylized infinity symbol composed of two overlapping circles, with the word "infinity" in a lowercase sans-serif font to its right, and "energy" in a smaller font below it.	
19	43. The marketplace appearance 20 of Defendant's tradename is: 21	Def. Ex. V
22		
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 <p><b>INFINITE</b> ENERGY HOME SERVICES <small>SOLAR-ROOFING-ELECTRICAL-HOME BATTERY-HVAC-WINDOWS</small></p>	
<p>44. Plaintiff's received an email from a third party which mentions "Rich"</p>	Def. Ex. W
<p>45. Plaintiff's solar energy services have an average installation time of 6-8 weeks.</p>	Def. Ex. X
<p>46. Plaintiff provides consultation to potential buyers.</p>	Def. Ex. Q, pg. 2
<p>47. As Plaintiff PMQ as the facts and circumstances concerning the allegations Plaintiff made in Plaintiff's First Amended Complaint said he can only make assumptions about Defendant's intent and knowledge. He does not know</p>	Def. Ex. D., Kelly Depp. 68:1 - 69:13)

1 anyone at Plaintiff who knows  
2 Defendant's conduct is willful.  
3

4

5 DATED: APRIL 24, 2023

6 **KROGH & DECKER, LLP**

7 By: /cagil arel/

8  
9 CAGIL AREL  
10 Attorney for Defendant,  
11 Infinite Energy Home Services,  
12 Inc.

